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MAKING THE VETERANS ADMINISTRATION WORK FOR VETERANS

*Tom Daschle**

Nearly two centuries ago the English philosopher William Godwin observed that "[a]s new cases occur the law is perpetually found deficient. It is therefore . . . necessary to make new laws."¹ Unfortunately, this precept has been disavowed by American lawmakers when addressing the issue of veterans' benefits. During the last fifty years, Congress has left virtually unaltered a little known, yet extremely important law which directly affects the lives of thirty million American veterans and their dependents.² This law, 38 U.S.C. § 211(a),³ provides that:

the decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans and their dependents or survivors shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise.⁴

The denial of judicial review of administrative decisions regarding veterans' benefits deprives American veterans and their dependents not only of the legal rights enjoyed by other recipients of federal benefits,⁵ but also of rights commonly afforded even to individuals convicted of felony offenses.⁶ This unconscionable inconsistency in our democratic system has been compounded by the United States Supreme Court's

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1. GODWIN, AN ENQUIRY CONCERNING POLITICAL JUSTICE 400 (1793).

2. 38 U.S.C. § 211(a) (1976). The original § 5 stated:

All decisions rendered by the Administrator of Veterans' Affairs under the provisions of this title, or the regulations issued pursuant thereto, shall be final and conclusive on all questions of law and fact, and no other official or court of the United States shall have jurisdiction to review by mandamus or otherwise any such decision.

The Economy Act of 1933, ch. 3, § 5, 48 Stat. 8, 9 (1934), *amended by* Act of Oct. 17, 1940, ch. 893, § 11, 54 Stat. 1193, 1197 (1941), also *amended by* Act of June 17, 1957, Pub. L. No. 85-56, § 211(a), 71 Stat. 83, 92 (1958), also *amended by* Act of Sept. 2, 1958, Pub. L. No. 85-857, § 211(a), 72 Stat. 1114, 1115 (1959), also *amended by* Act of Sept. 29, 1965, Pub. L. No. 89-214, § 1(b), 79 Stat. 880, 886 (1966), also *amended by* Act of Mar. 3, 1966, Pub. L. No. 89-358, § 4(h), 80 Stat. 12, 24 (1967), and *amended by* Act of Aug. 12, 1970, Pub. L. No. 91-376, § 8(a), 84 Stat. 787, 790 (1971).

3. 38 U.S.C. § 211(a) (1976) *supra* note 2.

4. *Id.*

5. Rabin, *Preclusion of Judicial Review in the Processing of Claims for Veterans' Benefits: A Preliminary Analysis*, 27 STAN. L. REV. 905 (1975).

6. *See* *Judicial Review of Veterans' Claims: Hearings Before the Subcommittee on Special Investigations of the House Committee on Veterans' Affairs*, 96th Cong., 2d Sess. 139 (1980) (statement of Lewis M. Milford, National Veterans Law Center) [hereinafter cited as *Judicial Review Hearings*].

holding in *Feres v. United States*,⁷ which prohibits servicemen from suing the Federal Government for damages under the Federal Tort Claims Act (FTCA).⁸ In *Feres*, the Supreme Court ruled that Veterans Administration (VA)⁹ benefits are a sufficient remedy for service-related injuries and therefore resort to the FTCA is unnecessary.¹⁰

This complete lack of independent review of Veterans Administration policies and procedures has produced unfair decisions regarding the payment of benefits,¹¹ a total disregard of scientific and medical opinions unsupportive of VA positions,¹² and has subjected countless

7. 340 U.S. 135 (1950).

8. Federal Tort Claims Act of 1946, ch. 753, 60 Stat. 842 (codified as amended in scattered sections of 28 U.S.C.).

9. The Veterans Administration "is an independent establishment in the executive branch of the Government, especially created for or concerned in the administration of laws relating to the relief and other benefits provided by law for veterans, their dependents, and their beneficiaries." 38 U.S.C. § 201 (1976) (original version at ch. 863, § 1, 46 Stat. 1061 (1930)).

10. 340 U.S. at 140. The Court stated that

[t]he primary purpose of the Act (FTCA) was to extend a remedy to those who had been without; if it incidentally benefitted those already well provided for, it appears to have been unintentional. Congress was suffering from no plague of private bills on the behalf of military and naval personnel, because a comprehensive system of relief had been authorized for them and their dependents by statute.

Id.

11. See, e.g., *Judicial Review Hearings*, *supra* note 6, at 319-28 (statement of Stanley G. Sommers, National Commander, American Ex-Prisoners of War Association). See also *Veterans' Rights Newsletter*, 2 VRN 21 (July-Aug. 1982).

12. *Judicial Review Hearings*, *supra* note 6, at 325 (letter from Charles Stenger, National Director of Services, American Ex-Prisoners of War, Inc. to Sydney J. Schuman, Chairman, Board of Veterans Appeals (Sept. 30, 1980). His letter offers the following account:

The case I will be discussing is one in which you will also be hearing from Stan Sommers, National Commander of the American Ex-POW Association, on behalf of the organization because of its startling and demonstrably erroneous conclusion reached to the effect that undernutrition of the kind experienced by POWs, particularly in Japanese camps during World War II, was "protective" against the specific type of medical condition for which the veteran had submitted a claim—coronary heart disease. We were particularly concerned that the Board chose to accept such a far-reaching conclusion on the basis of one expert's opinion. The alternative of relying on a panel is recommended by the American Heart Association Committee on Stress, Strain, and Heart Disease in its 1977 report in order to assess the pathogenesis of such a complex, long-term, multi-factorial disorder as atherosclerotic heart disease in a particular individual. Even though such a Board decision is not technically precedent setting, it is reasonable to assume that it could be used in training or influence the Board with similar cases in the future.

Stan asked me to comment since I had the opportunity to review the specific sources cited by the medical expert in reaching his conclusion in the case in question.

As background, the veteran, who was age 49 at the time of the review by a specialist was sought, had been under treatment for arteriosclerotic heart disease for ten years. This meant the condition probably began in his early or mid-30's, becoming clinically evident at around age 39. BVA requested "an opinion be furnished, with reasons thereto for as to whether the nutritional deficiency or other incidents of the veteran's POW experience precipitated the arteriosclerotic heart disease. I assume this included the possibility of being a contributing factor to its occurrence. He had been a prisoner of the Japanese in World War II for some 40 months, lost approximately 50 percent of body weight at one point, and was admitted to Letterman General Hospital several days after release from prison camp with the admitting diagnosis of "malnutrition, moderately severe, incurred while POW of Japan, cured on admission." "Cured" in this case almost certainly was intended to refer to the immediate undernutrition and not to elimination of all residual consequences of the past ex-

sick and dying veterans to needless suffering.¹³

This article will examine these policies and procedures as they affect two groups of American veterans: (1) post-World War II and Korean era veterans suffering from radiation exposure,¹⁴ and (2) Vietnam era veterans suffering from post-traumatic stress disorder¹⁵ and exposure to toxic herbicides such as Agent Orange.¹⁶ It will then analyze the arguments in opposition to judicial review of VA policies and procedures. Lastly, it will discuss and propose legislative reforms which, if enacted, would open up the Veterans Administration to independent judicial scrutiny, thereby ensuring veterans the fair treatment and benefits which they so clearly deserve.

BACKGROUND

According to the Veterans Administration, a veteran seeking benefits for a service-related injury "need do nothing more than file a claim."¹⁷ "Adjudication of the claim then proceeds without the necessity of the claimant further appearing at a hearing, producing further evidence, or presenting witnesses."¹⁸ After receipt of military service

tended period of starvation. He claimed that malnutrition was responsible for his coronary artery disease.

Deficiencies in the report of the medical expert were numerous. First, he cast aside the previous medical record from Letterman General Hospital reflecting the first hand knowledge of the treating physician with the statement: "... the Veteran exhibited little evidence of severe under-nutrition or vitamin deficiency at the time of, or subsequent to his release in the Fall of 1945." Apparently he based this on clinical laboratory stories [sic] done nearly four weeks after repatriation and ignored the clinical diagnosis of moderately severe malnutrition and statements as to the nearly 50 percent weight loss present at some point during confinement. Second, he further documented this conclusion by reference to three specific tables in the authoritative [sic] two-volume works by Ancel Keys and associates entitled "The Biology of Human Starvation". He apparently accepted the data in those tables which showed an acceptable calorie intake, moderate reduction in protein, and severe reduction in fats of all types. He noted the only serious deficiency in this diet was in thiamine. While such a diet under normal living conditions might, because of its low animal fat, be protective against atherosclerotic heart disease, this is not the actual diet the POW received. Warnings in those tables indicated the data was probably supplied from Japanese sources and stated the diet did not allow for the fact that "the meat issue included bones and the fish issue about half the time was so rotten as to be almost inedible." The military medical teams visiting these camps found that malnutrition was universal and the clinical examination on this veteran confirmed it in his case. Yet the fact remains the medical expert ignored well-documented information and accepted admittedly unreliable data, that fit in with a premise about low fat contents of a normal diet as protective. A starvation diet has been shown in the same source he quoted to have far reaching consequences on the cardiovascular system that could by no stretch of the imagination be called protective.

13. See, e.g., *Judicial Review Hearings*, *supra* note 6, at 281-88 (statement of Steven M. Champlin, Special Assistant to the President, Vietnam Veterans of America.)
14. See *infra* notes 56-65 and accompanying text.
15. See *infra* notes 24-33 and accompanying text.
16. See *infra* notes 34-55 and accompanying text.
17. *Hearings on S. 636 Before the Subcomm. on Oversight and Investigations, House Comm. on Veterans' Affairs*, 98th Cong., 1st Sess. (1983) (statement of John P. Murphy, VA General Counsel) [hereinafter cited as *Hearings on S. 636*]. (Not yet published).
18. *Id.*

Proceedings before the Veterans Administration are *ex parte* in nature. It is the obligation of the Veterans Administration to assist a claimant in developing the facts

and medical treatment records,¹⁹ VA officials in one of the fifty-three regional VA offices rule on the merits of the claim and notify the claimant of their decision as well as his right to a hearing and appeal.²⁰ A claimant who wishes to challenge the decision may appeal it within the agency to the Board of Veterans Appeals (BVA)²¹ in Washington. Upon the filing of such an appeal, the Board "makes a complete and independent *de novo* review of all the evidence of record."²² Unfortunately, the BVA cannot "question the legality of the regulations and instructions of the Administrator or the precedent opinions of the VA's General Counsel."²³ Thus, the Board lacks the authority to conduct a review independent of official VA policies. In effect, those policies are beyond challenge.

This lack of accountability has allowed the VA to arbitrarily deny veterans' claims since it need not justify either the procedure followed or the data relied upon in denying the claims. The most egregious transgressions arise in the denial by the VA of benefits to those veterans suffering from post-traumatic stress disorder (PTSD), exposure to toxic herbicides, or exposure to harmful levels of radiation.

Post-Traumatic Stress Disorder

Post-traumatic stress disorder (PTSD),²⁴ a condition recently recognized by the American Psychiatric Association²⁵ "may be characterized by rage and feeling of betrayal, guilt over having survived, confusion and memory problems, apathy, depression, anxiety, obsessive memo-

pertinent to his claim and to render a decision which grants him every benefit that can be supported in law while protecting the interest of the government.

38 C.F.R. § 3.103(a) (1982).

19. 38 C.F.R. § 3.203(a) (1982). Under this section, the veteran is required to provide his or her record of service in order to substantiate the length, time, and character of service, as well as to provide proof of character of discharge.

The veteran must also provide a report of examination or hospitalization to establish entitlement to benefits or an increase in benefits. See 38 C.F.R. § 3.157(a) (1982).

20. 38 C.F.R. § 3.103(e) (1982).

21. 38 U.S.C. § 4001 (1976).

The principle function of the Board is to consider all applications on appeal properly before it, conduct hearings on appeal, evaluate the evidence of the record and enter decisions in writing on the questions presented on appeal.

38 C.F.R. § 19.109 (1982).

22. *Hearings on S. 636*, *supra* note 17, at 3.

23. *Veterans' Administration Adjudication Procedure and Judicial Review Act, Hearings Before the Senate Committee on Veterans' Affairs*, 97th Cong., 1st Sess. 6 (1981) (statement of Sen. Alan Cranston, D-Cal.).

24. The "essential feature" of PTSD is the development of characteristic symptoms after the experiencing of a psychologically traumatic event or events outside the range of human experience usually considered to be normal. The characteristic symptoms involve reexperiencing the traumatic event, numbing of responsiveness to, or involvement with, the external world, and a variety of other autonomic, dysphoric, or cognitive symptoms.

KAPLAN, FREEDMAN & SADOCK, *COMPREHENSIVE TEXTBOOK OF PSYCHIATRY*/III 1518 (3d ed. 1980) (quoting AMERICAN PSYCHIATRIC ASSOCIATION, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* (3d ed. 1980)).

25. See AMERICAN PSYCHIATRIC ASSOCIATION, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* (3d ed. 1980).

ries of combat experiences, nightmares, insomnia, irritability, psychosomatic manifestations such as headaches, dizziness and stomach troubles, startled reactions, fear of losing control, panic attacks, emotional numbing, and frequent denial that anything [is] the matter."²⁶ A recent VA Department of Veterans Benefits (DVB) circular distributed to VA regional offices defines the requisite elements of proof necessary to establish service connection for PTSD.²⁷ These prerequisites illustrate the agency's unjustified reluctance to compensate veterans for non-traditional injuries and thus the need for judicial review of VA policies.

According to the VA, a veteran's recovery of benefits for PTSD is conditioned upon the presence of "objective evidence" of trauma in the veteran's service record.²⁸ Objective evidence includes: "official service records indicating medals or commendations awarded for combat; wounds suffered as a result of enemy action or for acts of valor; duty assignment in a grave registration unit; medical or paramedical duties on a burn ward; or experience as a prisoner of war."²⁹ Thus, the VA's inquiry consists solely of a review of the veteran's service record for the presence of activities likely to cause psychological trauma. This review focuses predominantly upon "front-line" activities.

Unfortunately, this restricted search for objective evidence disregards the fact that a veteran may have been exposed to traumatic conditions not reflected in his service record. As opponents of the circular stress,

[t]he very nature of the hostilities in Vietnam which could affect even the most 'secure' rear-echelon [sic] troops involved stressors infrequently recorded in individual service records. (For example, the bombing of a Saigon disco in 1972.) And in many instances the services had an interest in not recording certain information. (For example, action in Cambodia or certain activities of Navy SEAL Teams.)³⁰

Several witnesses who appeared at a Hospitals and Health Care Subcommittee³¹ hearing in March of 1983 testified that PTSD often afflicts veterans whose service records lack objective evidence of trauma.³² Nonetheless, this policy continues as the VA consistently denies compensation to veterans who cannot present objective evidence.

Fearing that the wide publicity given to PTSD has given rise to bogus claims, the VA has recently become even more reluctant to grant benefits. Such a policy suffers three major shortcomings. First, the VA

26. LEGACIES OF VIETNAM: COMPARATIVE ADJUSTMENT OF VETERANS AND THEIR PEERS PURSUANT TO PUBLIC LAW 95-202 at 50 (Comm. Print 1981).

27. DEPARTMENT OF VETERANS BENEFITS, DVB CIRCULAR 21-82-7 (May 3, 1982).

28. *Id.*

29. *Id.*

30. *Judicial Review Hearings*, *supra* note 6, at 22.

31. This is a subcommittee of the House Veterans' Affairs Committee.

32. *H.R. 1443 and Oversight of the V.A.'s Readjustment Counseling Program for Vietnam-Era Veterans: Hearings Before the Subcomm. on Hospitals and Health Care to Consider H.R. 1443 and Similar H.R. 2213*, 98th Cong., 1st Sess. (1983).

has been unwilling to specify the date of the alleged "wide publicity" that has supposedly tainted the veteran population.³³ Nor has it provided for public inspection of the data used in making this determination. Second, few individuals outside of the medical profession were even aware of the existence of PTSD prior to its being publicized. Given this situation, many veterans suffering from PTSD may not have realized the nature and cause of their illness until that time. Only now could they come forward for help. Third, the VA presumes that all veterans who filed claims after this arbitrary date were made aware of PTSD only as a result of the publicity. Such a presumption endangers the eligibility of those veterans not aware of the publicized information and discriminates against veterans who live in small towns or rural areas where access to media coverage of PTSD was delayed or non-existent.

Lack of judicial review has permitted the VA to perpetuate its policy of arbitrarily denying PTSD benefits to deserving veterans in the face of considerable scientific and medical evidence which supports the legitimacy of such claims. This harshly restrictive and narrow-minded approach will continue until Congress acts to provide for the unbiased scrutiny of their claims.

Agent Orange

Since the beginning of the controversy over the effect on humans of the chemical defoliant Agent Orange,³⁴ the Veterans Administration has adamantly opposed contentions that exposure to Agent Orange could cause cancer and lead to other adverse health effects.³⁵ At the

33. Letter from Max R. Woodall, Director, Compensation and Pension Service, Veterans Administration, to Keith Snyder, Coordinator, Veterans Education Project, Inc. (Aug. 20, 1983).

34. Agent Orange is a herbicide, well known because of its use in the jungles of Vietnam. Several chemicals are used for herbicides, including arsenic compounds, paraquat, diquat and chlorophenoxy. Agent Orange is a mixture of two chlorophenoxy herbicides: 2,4-D and 2,4,5-T. One gallon of Agent Orange theoretically contained 4.21 pounds of 2,4-D and 4.41 pounds of 2,4,5-T.

The National Academy of Science (Blackman *et al.* 1974) reported that from August, 1965, through February, 1971, 2,962 herbicide missions (out of a total 6,237 missions for all herbicides and all uses) for forest defoliation used Agent Orange. These 2,962 missions accounted for 90 percent of all Agent Orange used in Vietnam. From August, 1965, through February, 1971, crop destruction missions with Agent Orange accounted for eight percent of the herbicide applied. The remaining two percent of Agent Orange was used in South Vietnam around base perimeters, cache sites, waterways, and communication lines (Blackman *et al.* 1974). 2,4-D and 2,4,5-T were used for their selective effects on broadleaf plants and non-effect on grasslike plants such as rice or seed grains.

Herbicide Orange was sprayed on 3.5 million acres from 1965 through 1970. Ninety percent of Agent Orange was sprayed on 2.9 million acres of inland forests and mangrove forests.

Current Status of Agent Orange Studies; Hearings Before the Subcomm. on Oversight and Investigations of the House Comm. on Veterans' Affairs, 97th Cong., 1st Sess. 136-37 (1981) (Report by the American Council of Science and Health).

35. *See Oversight Hearings to Receive Testimony on Agent Orange: Hearings Before the Subcommittee on Medical Facilities and Benefits of the House Committee on Veterans' Affairs*, 96th Cong., 2d Sess. 356-63 (1980) (statement of Lewis M. Milford, National Veterans Law Center) [hereinafter cited as *Oversight Hearings*].

same time, the VA has exacerbated veterans' concerns about Agent Orange's effects by footdragging on a congressionally-mandated study³⁶ and openly ignoring scientific evidence which conflicts with agency positions.³⁷

A particularly disturbing feature of this controversy was the publication by the VA of an Agent Orange Program Guide (Program Guide).³⁸ The Program Guide states that Agent Orange causes no illness other than a skin condition called chloracne.³⁹ This document has been distributed to all VA regional offices for use in adjudicating Agent Orange claims. It serves as the benchmark for official VA policy regarding Agent Orange. However, according to the National Veterans Law Center (Law Center), a Washington-based lawyers group specializing in veterans law,⁴⁰ the Agent Orange Program Guide was drafted without the participation of the Environmental Protection Agency (EPA), the Department of Health and Human Services (HHS), or any other government agency possessing expertise on the effects of toxic herbicides on humans.⁴¹ The Law Center claims that "[n]o outside scientific information from interested members of the public was solicited

36. An epidemiology study was mandated by the Veterans Health Programs Extension and Improvement Act of 1979 "to determine if there may be long-term adverse health effects . . . from such exposure." Pub. L. No. 96-151, § 307, 93 Stat. 1092, 1097 (1979).

37. See *infra* notes 43, 44, 51 and accompanying text.

38. An April 17, 1978, one page intra-agency publication. Guy H. McMichael, General Counsel for the Veterans Administration, asserts that:

. . . the program guide does not contain regulatory material, and . . . it does not constitute a 'rule' within the meaning of the APA (Administrative Procedure Act, 5 U.S.C. § 553 (1982)) and the FOIA (Freedom of Information Act, 5 U.S.C. § 552(a)(1) (1982)). In fact, a VA Program Guide is nothing more than an internal instructional document, in the nature of a manual, which has no substantive impact on the rights or obligations of claimants . . . (from the Government's principle memorandum of law filed in the *White* case. See *infra* note 46 and accompanying text.):

" . . . [t]he Agent Orange Program Guide [P.G. 21-1, section 0-18] is neither a new rule, nor is it a change in existing rules. It is informational, designed to inform agency employees of the existing state of factual knowledge and, to a lesser extent, the state of the law. . . ."

Agent Orange: Exposure to Vietnam Veterans, Oversight Hearings: House Comm. on Interstate and Foreign Commerce, 96th Cong., 2d Sess. 244-45 (1980) (Letter from Guy H. McMichael to Rep. Robert C. Eckhardt, D-Tex., Oct. 21, 1980) [hereinafter cited as *Agent Orange Exposure Hearings*].

39. See *Oversight Hearings*, *supra* note 35, at 332-33. See also Wilber, *Agent Orange and Dioxin: Do 2.4 Million Plaintiffs Have a Cause of Action?* 22 TRAUMA 1:11 (1980). Chloracne is a disorder of the hair follicle in the skin and the specialized gland associated with it. The gland (called the "sebaceous gland," which secretes an oily substance) produces, in this disorder, too much sebum. A blackhead results; in mild cases that may be all that occurs. *Id.* at 1:38.

40. The Law Center is a public interest law firm affiliated with the American University School of Law, specializing in the legal problems of veterans. The Law Center is General Counsel to the National Veterans Task Force on Agent Orange, a national coalition of veterans organizations concerned with the Agent Orange issue, General Counsel to the National Association of Concerned Veterans, a national Vietnam veterans membership organization, and counsel on behalf of thousands of Vietnam era and other veterans in numerous federal class action lawsuits and federal administrative hearings. *Oversight Hearings*, *supra* note 35, at 324 (statement of the National Veterans Law Center).

41. *Agent Orange Exposure Hearings*, *supra* note 38, at 142 (statement of Lewis M. Milford, National Veterans Law Center).

before this document was prepared, nor was any member of the Vietnam veterans community consulted before the development of this position."⁴²

Four days after the VA Program Guide was distributed, the EPA published a forty-page Rebuttable Presumption Against Registration (RPAR) for the chemical 2,4,5-T, one-half of Agent Orange's chemical composition.⁴³ One year later, the EPA issued an emergency suspension order banning further use of this same chemical.⁴⁴ Notwithstanding the EPA's contrary views on the hazards of 2,4,5-T, the VA has not amended its Program Guide.⁴⁵

In 1979, the Law Center filed a lawsuit seeking to invalidate the Program Guide, to stay all Agent Orange claims, to require public rulemaking, and to require notification to all claimants that action on their claims must await completion of the rulemaking.⁴⁶ The Law Center contends⁴⁷ that the Program Guide violates the Freedom of Information Act,⁴⁸ as well as several rulemaking provisions of Title 5 of the United States Code. Although the court challenge remains unresolved, such action has undermined the credibility of the Veterans Administration and has created widespread hostility toward the agency among many Vietnam veterans.⁴⁹

Not surprisingly, the VA has been unresponsive to veterans' claims seeking recovery for disabilities resulting from exposure to Agent Orange.⁵⁰ The agency continues to deny benefits despite the recent conclusions of an international panel of scientists that exposure to dioxin, an uncontrolled contaminant in Agent Orange, can cause cancer in humans.⁵¹ The VA contends that no scientific or medical consensus exists on the alleged carcinogenicity of dioxin.⁵²

Ironically, in contrast to their adamant disregard for Agent Orange

42. *Id.*

43. 43 Fed. Reg. 17,115, 17,116 (1978):

Summary: 2,4,5-Trichlorophenoxyacetic Acid (2,4,5-T) has been found to exceed certain risk criteria set forth in 40 C.F.R. § 162.11. This notice requests registrants and other interested persons to submit rebuttals and other information on the presumption and to submit any other data on the risks and benefits of the pesticide chemical. This notice is the first of several which will give public notification of the Agency's progress in reviewing this chemical.

44. 44 Fed. Reg. 15,874 (1979). The emergency suspension order was issued Feb. 28, 1979.

45. *Agent Orange Exposure Hearings*, *supra* note 41, at 142 (statement of Lewis M. Milford, National Veterans Law Center).

46. William G. White, et al. v. Max Cleland, et al., Civil Action No. 79-1426 (D.D.C. filed May 31, 1979). *See also Oversight Hearings*, *supra* note 35, at 338-41.

47. *Id.*

48. 5 U.S.C. § 552 (1982).

49. *See Oversight Hearings*, *supra* note 35, at 330.

50. *See Oversight Hearings*, *supra* note 35, at 328-36.

51. ENVIRONMENTAL PROTECTION AGENCY, CINCINNATI, OHIO, PEER REVIEW WORKSHOP ON DIOXINS, CONSENSUS STATEMENT (July 1983).

52. *Hearings on H.R. 1961: Vietnam Veterans Agent Orange Relief Act: Hearings Before the House Subcomm. on Compensation, Pension and Insurance, House Veterans' Affairs Comm.*, 99th Cong., 1st Sess. (1983) (statement of Dorothy L. Starbuck, Chief Benefits Director, Veterans Administration). (Not yet published).

claims, the VA has consistently awarded compensation for cardiovascular conditions which allegedly afflict veterans who have suffered the amputation of one or both legs at or above the knee.⁵³ These awards are based on a single study by the Medical Follow-up Agency of the National Academy of Sciences.⁵⁴ By all accounts, however, no consensus has been reached recognizing a relationship between cardiovascular complications and amputations.⁵⁵

In light of the mounting scientific evidence of the toxicity of Agent Orange, it is doubtful that the VA's insistent denial of Agent Orange claims would be affirmed by a reviewing court evaluating the respective weight of the evidence put forth by each side. The absence of such review, however, enables the VA to continue to adhere to such outmoded and self-serving notions of the chemical's effects.

Radiation Exposure

The arbitrary policies of the Veterans Administration extend beyond the evaluation of claims of Vietnam veterans. In dealing with veterans exposed to radiation at nuclear test sites, the VA and the Defense Nuclear Agency (DNA)⁵⁶ have adopted policies which serve to bar most of the claims that are filed.⁵⁷ Although the VA recognizes a long list of disabilities potentially caused by radiation exposure, benefits are granted only if the VA determines that the veteran was exposed to harmful levels of radiation.⁵⁸ Predictably, the official position of the VA and the DNA is that the vast majority of veterans present during nuclear tests did not receive such harmful exposure.⁵⁹

The soundness of this policy, however, has been called into question by recent challenges to the effectiveness of the safety and detection devices used by the 40,000 soldiers stationed at the Crossroads nuclear

53. *Id.* at 321-22 (statement of Lewis M. Milford, National Veterans Law Center).

54. *Id.*

55. VETERANS' ADMINISTRATION, 96th CONG., 1st SESS., CAUSAL RELATIONSHIP BETWEEN SERVICE-CONNECTED AMPUTATION AND SUBSEQUENT CARDIOVASCULAR DISORDER: A REVIEW OF THE LITERATURE AND A STATISTICAL ANALYSIS OF THE RELATIONSHIP 71-72 (Sen. Comm. Print 1979).

56. *See Effect of Radiation on Human Health—Health Effects of Ionizing Radiation: Hearings Before the Subcomm. on Health and the Environment of the House Comm. on Interstate and Foreign Commerce*, 95th Cong., 2d Sess. 218 (1978) (testimony of Peter Haas, Deputy Director, Science and Technology, of the Defense Nuclear Agency) [hereinafter cited as *Health Effects Hearings*]. Mr. Haas stated that the "DNA is acting as The [sic] Department of Defense's action agency on the investigation of the possible effects of this Nation's [sic] atmospheric nuclear test program on participants"

57. A Radiation Claims Procedure and a Radiations Program Guide were issued by the VA in 1979. *See generally A-Test Vets, Families Fight Cancer and U.S. Government*, 68 A.B.A. J. 26, 27 (1982) [hereinafter cited as *A-Test Vets*].

58. *See Health Effects Hearings*, *supra* note 56, at 462 (statement of Dr. James Smith, M.D., Director of the Nuclear Medicine Service for the VA), at 473 (statement of Dr. William Maloney, M.D., consultant to the VA).

59. *A-Test Vets*, *supra* note 57, at 27. *See also* 44 Fed. Reg. 49,090-91 (Aug. 21, 1979) for a discussion of the findings of the Interagency Task Force on the "Report of the Interagency Task Force on the Health Effects of Ionizing Radiation."

test site in the South Pacific during 1946.⁶⁰ The primary radiation detection devices used at the site were film badges, constituting only "the minimal equipment required to measure gamma radiation."⁶¹ Unfortunately, because strict enforcement of safety precautions was lacking, many individuals did not wear the badges.⁶² Consequently, the level of radiation to which they were exposed is not determinable. Furthermore, a safety monitor at the test site noted that the film badges were "experimental . . . and all too often failed to work entirely . . . and [even] when they did [the results were often] erratic and misleading."⁶³ The same individual added that, "I do believe . . . that many of us probably received much more ionizing radiation than the instruments of very low beta-sensitivity were able to record."⁶⁴ Additional documentation has revealed a general indifference to, and ignorance of, proper safety precautions at the test site.⁶⁵

The Crossroads incident demonstrates the total inadequacy of the VA and DNA policy. The validity of claims arising from alleged radiation exposure cannot be evaluated in terms of exposure level when no reliable method of measuring that level exists. Yet, veterans suffering recognized effects of radiation exposure continue to have their claims summarily dismissed based on this procedure. Again, the lack of judicial review enables the VA to ignore evidence which conflicts with established VA policy.

ATTORNEY FEES

Another barrier to veterans seeking compensation for their injuries is the statutory limitation on attorney fees imposed by 38 U.S.C. § 3404.⁶⁶ This section prohibits a veteran from paying more than ten dollars to an attorney to represent the veteran in VA proceedings.⁶⁷ This provision effectively precludes veterans from retaining counsel.⁶⁸

According to the American Bar Association, "the availability of attorneys can play an important role in highlighting areas of vagueness and excessive discretion and in promoting effective presentation of complex claims, e.g., the 'service-connection' cases."⁶⁹ Unfortunately, section 3404 disregards the importance of legal advice. Veterans must rely instead on the assistance of veterans' service organizations whose

60. *A-Test Vets*, *supra* note 57, at 27.

61. *Hearings on S. 636*, *supra* note 17 (statement of Dr. Karl Morgan).

62. *See Health Effects Hearings*, *supra* note 56, at 279-83 (1970 AEC Study), at 251 (statement of Maj. Alan Skerker).

63. Letter from William G. Meyers to Stafford L. Warren (Dec. 31, 1946).

64. *Id.*

65. *See Note, Radiation Injury and the Atomic Veteran: Shifting the Burden of Proof on Factual Causation*, 32 HASTINGS L.J. 933 (1981).

66. 38 U.S.C. § 3404 (1976).

67. *Id.*

68. *Judicial Review Hearings*, *supra* note 6, at 174-77 (statement of Lewis M. Milford, National Veterans Law Center).

69. *Hearings on S. 636*, *supra* note 17 (statement of Frederick Davis, Representative, ABA).

members, though well-meaning, lack the training and critical skills of competent legal counsel. Thus, veterans' claims are seldom presented in the most effective manner.

Attorney participation has been questioned on the ground that it would increase claimants' costs.⁷⁰ However, legislation recently passed by the Senate would prohibit attorney participation until after a Board of Veterans Appeals decision on the merits of the case.⁷¹ After this stage attorney fees would be limited to five hundred dollars or twenty-five percent of the amount of past due benefits.⁷² Any further concern could be addressed by imposing practical limits on attorney fees.

Even if VA policies were subject to independent judicial review, such review would be ineffective without repeal of the attorney fee limitation. The assistance of competent counsel is indispensable to effective court review, particularly in veterans' cases, which frequently involve complex environmental, scientific, and medical issues. Most service organizations currently representing veterans have endorsed both judicial review and repeal of section 3404.⁷³

OPPOSITION TO JUDICIAL REVIEW

Opponents of judicial review of VA policy and procedure maintain that such review would make the system adversarial.⁷⁴ This argument, however, overlooks the fact that the appeals process is already adversarial. Unfortunately for the veteran, the opposition acts as both defendant and judge. Proponents of judicial review respond by arguing that lawyers familiar with agency practice recognize that their role as an administrative advocate differs from their role in the courtroom.⁷⁵ "[T]he administrative lawyer frequently acts to explain a complex agency [procedure] to a client, attempts to clarify issues for both the client and the agency, and tries to resolve claims with as little acrimony as possible."⁷⁶ Where counsel functions in such a role, a disruptive adversarial atmosphere need not result. In fact, legislation has already been passed by the Senate which would maintain the current setting by preserving the aspects most desirable and advantageous to veterans.⁷⁷

Opponents of judicial review also contend that such review of VA decisions would overburden the court system.⁷⁸ This argument is perhaps their weakest. The increased caseload resulting from judicial re-

70. *Hearings on S. 636, supra* note 17 (statement of John P. Murphy, VA General Counsel).

71. S. 349, 97th Cong., 1st Sess. § 401(c)(1), 127 CONG. REC. S809 (daily ed. Jan. 30 1981).

72. S. 636, 98th Cong., 1st Sess., 129 CONG. REC. S8488, S8492 (daily ed. June 15, 1983).

73. *See generally Judicial Review Hearings, supra* note 6.

74. *Hearings on S. 636, supra* note 17 (statement of John P. Murphy, VA General Counsel).

75. *Hearings on S. 636, supra* note 17 (statement of Frederick Davis, Representative, ABA).

76. *Hearings on S. 636, supra* note 17 (statement of John Terzano, Legislative Director, Vietnam Veterans of America).

77. S. 636, *supra* note 72.

78. *Hearings on S. 636, supra* note 17 (statement of John P. Murphy, VA General Counsel).

view would be minimal.⁷⁹ Although a deputy assistant attorney general estimates that 4,600 additional appeals would result from judicial review,⁸⁰ his assertion is disputed by Frederick Davis, Dean of the University of Dayton School of Law.⁸¹ Dean Davis believes this prediction is unfounded for three reasons. First, many cases will be withdrawn, settled, or remanded before they reach the appellate review stage. Second, since current legislative proposals would dispense with several of the procedural requirements of the VA claims process, fewer appeals on procedural grounds would result.⁸² Third, veterans seldom believe their cases are worthy of a hearing and consequently, they will rarely hire a lawyer to appeal their case.⁸³

The Board of Correction of Military Records (BCMR),⁸⁴ whose decisions are subject to judicial review, has had fewer than one hundred of its decisions appealed to federal court out of the tens of thousands it has recorded.⁸⁵ Any increase in appellate litigation resulting from judicial review of VA decisions should not substantially exceed that of the BCMR.⁸⁶

Opponents of judicial review have often cited the adage, "[i]f it ain't broke, don't fix it." To many observers, the VA system is indeed "broke." Certainly, the negative image fostered in recent years by the VA's dogmatic intransigence indicates that something is indeed wrong. Judicial review would make a difference. As stated by one veterans' organization, "[r]eview by the courts would provide an explanation of decision-making and a ventilation of the frustrations of veterans."⁸⁷

LEGISLATIVE PROPOSALS

The House of Representatives has not voted on judicial review legislation. The primary debate has occurred in the Senate, where the character of judicial review legislation has been progressively narrowed from the 95th to the 98th Congress, reflecting concerns about the prac-

79. *Judicial Review Hearings*, *supra* note 6, 134, 147-49 (statement of Lewis M. Milford, National Veterans Law Center).

80. *VA Administrative Procedure and Judicial Review Act: Hearings Before the Senate Comm. on Veterans' Affairs, 95th Cong.*, 1st Sess. 401-02 (1977) (statement of Paul Nejelski, Deputy Assistant Attorney General, Department of Justice).

81. *Hearings on S. 636*, *supra* note 17 (statement of Frederick Davis, Dean of the University of Dayton School of Law and past Chairman, House Committee on Veterans' Affairs).

82. *Id.*

83. *Hearings on S. 636*, *supra* note 17 (statement of John P. Murphy, VA General Counsel). See also *Judicial Review Hearings*, *supra* note 6, at 317 (statement of Hon. William Lehman).

84. The BCMR was created by passage of the Legislative Reorganization Act of 1946, ch. 753, § 207, 60 Stat. 812, 837 (1947) (codified at 10 U.S.C. § 1552 (1982)).

85. *Judicial Review Hearings*, *supra* note 6, at 198 (statement of David F. Addleston, Co-director of the National Veterans Law Center, on S. 330, as amended, before the Senate Judiciary Committee, June 20, 1979).

86. *Hearings on S. 636*, *supra* note 17 (statement of John Terzano, Legislative Director, Vietnam Veterans of America).

87. *Id.*

tical breadth of such review.⁸⁸ Most Senators, however, concur on the need for some access to the federal court system, particularly with respect to judicial review of VA law and procedures.⁸⁹

Legislation adopted by the Senate in the 96th Congress would limit factual review by the court to "arbitrary and capricious" decisions.⁹⁰ Pursuant to this bill, judicial review would be deferred until the VA was given an opportunity on remand to reconsider the case record.⁹¹ The report of the Senate Veterans' Committee⁹² stated, "[t]his formula was intended to strike a balance between the proper functions of the reviewing court and the Administrator by permitting the court to exercise its own judgment in resolving issues of law but restricting narrowly the court's review of questions of fact."⁹³

However, the 97th Congress saw the "arbitrary and capricious" test as an imprecise basis for review.⁹⁴ Thus, legislation passed by the Senate in the 97th and 98th Congresses would permit factual review only when the VA decision is "so utterly lacking in a rational basis in the evidence that a manifest and grievous injustice would result if [the finding] were not set aside."⁹⁵

The proposed legislation would retain the present ten dollar limitation on attorney fees for cases appealed within the VA but resolved prior to a final decision of the Board of Veterans Appeals.⁹⁶ For cases resolved by the BVA, the fee limitation would be five hundred dollars or twenty-five percent of the past due benefits awarded the claimant.⁹⁷ If a case were settled in the veteran's favor outside of the VA, the attorney fee limitation would again be twenty-five percent of the total past due benefits awarded or a "reasonable" attorney's fee.⁹⁸ For a case resolved against a veteran claimant, the fee would be limited to a maximum of seven hundred fifty dollars.⁹⁹

In its efforts to fashion legislation to allow for judicial review of VA rules, regulations, and findings of fact, the Senate clearly is concerned with preserving those facets of the present system which are most advantageous to veterans—free representation before the VA by service officers of veterans' organizations, liberal standards of evidence admissibility, and prohibition of cross-examination.¹⁰⁰

Legislation pending in the House of Representatives is virtually

88. Compare S. 636, *supra* note 72, with S. 330, 96th Cong., 2d Sess., 125 CONG. REC. S987 (daily ed. Feb. 1, 1979).

89. See S. 636, *supra* note 72, at S8495.

90. Hearings on S. 636, *supra* note 17 (statement of John P. Murphy, VA General Counsel).

91. S. 330, *supra* note 88.

92. S. REP. NO. 130, 98th Cong., 1st Sess. (1983).

93. *Id.*

94. *Id.*

95. *Id.*

96. S. 636, *supra* note 72, at 8492.

97. *Id.*

98. *Id.*

99. *Id.*

100. S. 636, *supra* note 72, at 8490.

identical to that already adopted by the Senate.¹⁰¹ Thus far, two days of House hearings have been held. Notwithstanding the failure of the House to cooperate in past efforts to resolve this iniquitous dilemma, given Senate passage of S. 636 and new membership on the House Veterans' Affairs Committee, proponents are hopeful that the House will follow the Senate's lead and adopt some form of judicial review legislation.

CONCLUSION

28 U.S.C. § 211(a), the present law which forecloses judicial review of decisions by the Veterans Administration denying claims of American veterans seeking benefits for their war-related injuries, is an archaic and undemocratic law which must be replaced with legislation that allows for a fair and effective appeal from the VA's denial of benefits. Congress should enact new legislation which requires the VA to set forth the objective data used in reaching a decision to deny or limit benefits, and to allow recovery for non-traditional injuries, which, though not reflected in a veteran's service record, are provable. Additionally, such new legislation should require more forcefully that the VA take into account available medical and scientific evidence in issuing its rulings. Lastly, because legal counsel is essential for the effective enforcement of legal rights, reasonable attorney fees must be allowed.

101. H.R. 1959, 98th Cong., 1st Sess., 129 CONG. REC. H939 (daily ed. March 8, 1983), and H.R. 3300, 98th Cong., 1st Sess., 129 CONG. REC. H3962 (1983).

EDITOR'S NOTE

As this article was going to print, the U.S. House of Representatives passed significant legislation affecting veterans' benefits. On January 30, 1984, H.R. 1961 was passed by voice vote. The bill, sponsored by Representative Daschle, affords limited compensation to Vietnam era veterans suffering from the effects of exposure to Agent Orange and other potentially harmful herbicides and post-World War II and Korean era veterans suffering from exposure to radiation. The bill would provide \$65 to \$1,250 per month in benefits to veterans suffering from specific diseases depending upon the severity of their disability. H.R. 1961 has been sent to the U.S. Senate for consideration.